No. 7306

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ETHLYN B. CLEMENTS, individually and as administratrix of the estate of Ralph L. Clements, also known as R. L. Clements, deceased,

Appellant,

vs.

GEORGE W. COPPIN, as trustee in bankruptcy of the estate of the Flintex Corporation (a corporation),

Appellee.

BRIEF FOR APPELLANT.

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

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STATEMENT OF CASE.

This case involves a proceeding in contempt. On the 7th day of June, 1933, Martin J. Dinkelspiel, one of the attorneys for the plaintiff and appellee, filed in the lower court an affidavit upon information and belief charging that appellant had failed and refused to pay certain alleged trust funds (Trans. 5) as ordered by an interlocutory order dated May 22, 1933

(Trans. 1-2-3), and asking that she be required to show cause why she should not be punished for contempt.

The order to show cause was issued on June 7, 1933 (Trans. 8), fixing the time for such appearance for June 19, 1933. To this order to show cause appellant filed her answer under oath in which she denied that she had in her possession or under her control any of said money or any part of it, also alleging that she was unable to comply with said order to pay the money. (Trans. 3-4.)

On the 19th day of June, 1933, appellant appeared in the lower court pursuant to said order as the minutes of the court of that day show. (Trans. 15.) These minutes show that:

> "It appearing that said Ethlyn B. Clements is guilty of contempt of this court, in failing to comply with the order of the court dated May 22, 1933, commanding her to pay over to the clerk of this court certain funds as more fully appears in said order"

then it is immediately adjudged that the appellant is guilty of contempt of court and she is ordered imprisoned in the County Jail. (Trans. 15-16.)

From the foregoing it appears that no trial or hearing in fact was had. Neither the order of commitment (Trans. 14) nor any other order in the case finds or states or shows that the appellant was able to perform the order of May 22, 1933, or to pay the money which she was ordered to pay. From the order of commitment and the judgment finding appellant

guilty of contempt of court (Trans. 14) this appeal is taken.

ARGUMENT.

The report of the Special Master was not made a part of the proceeding upon which the order of the trial judge made on May 22, 1933. (Trans. 1-2-3.) The trial judge made his findings from said report, and as far as those findings are concerned, they in no manner show how the Special Master arrived at his conclusions.

The order recites:

> "This cause came on regularly to be heard this ..... day of May, 1933, upon the report of W. E. Tucker, as Special Master, to whom it was referred, to take and state an account of certain trust funds passing into the hands of the defendant, Ethlyn B. Clements, both individually and as the administratrix of the estate of Ralph L. Clements, deceased, pursuant to the interlocutory decree herein, which report found that twenty-two thousand five hundred dollars ($22,500.00) of said trust funds passed into her hands individually and seven thousand two hundred fifty-nine and 12/100 ($7,259.12) dollars passed into her hands as administratrix of said estate, and said report further found that eleven thousand nine hundred seventy-nine ($11,979.00) dollars of said twenty-two thousand five hundred ($22,-500.00) dollars and four thousand eight hundred five and 20/100 ($4,805.20) dollars of said sum of seven thousand two hundred fifty-nine and 12/100 ($7,259.12) dollars are now in her possession and control; and it appearing that no excep-

tions were filed to the report of said Special Master within the time allowed by law, or at all; and it further appearing that the report of said Special Master is in all respects true and correct,

It is ordered that the report of W. E. Tucker, as such Special Master be, and the same is hereby allowed and confirmed.

It is further ordered that defendant, Ethlyn B. Clements, pay into the hands of the clerk of this court, subject to the further order of this court, said sum of eleven thousand nine hundred seventy-nine dollars ($11,979.00) and four thousand eight hundred five and 20/100 ($4,805.20), dollars, respectively, belonging to the estate of said bankrupt, The Flintex Corporation, now in the possession and under the control of said defendant, within 10 days from the date of service hereof, and that jurisdiction is retained by this court to make such further orders and/or decrees as may be meet and proper.

Dated, May 22nd, 1933.

Frank H. Kerrigan,
United States District Judge."

but it is nowhere shown that the Special Master took any account or examined any records or took any evidence. As far as anything contained in the order is concerned, the Special Master might have arrived at his conclusions in the most perfunctory manner.

The whole proceeding shows that a Special Master was appointed to determine what part of the alleged trust fund passed into the defendant's hands and that such Special Master made some sort of a report and upon that report the trial court made a summary

order that defendant pay the money to the clerk. (Trans. 2.) To this order the defendant filed her answer under oath, denying that she had any of said money in her possession or under her control and that she is unable to comply with said order. Then the court ordered defendant to appear in court on the 19th day of June, 1933, and show cause why she should not be adjudged guilty of contempt for her failure and refusal to comply with the interlocutory order of this court made the 22nd day of May, 1933, requiring her to pay to the clerk $16,000.00. (Trans. 16.)

The defendant did appear in court on the 19th day of June, 1933 (Trans. 15), and on that day without any hearing or the taking of any evidence, the court committed the defendant to the County Jail and that she be held until she turns over and pays $16,000.00 to the clerk. (Trans. 14.)

There is incorporated in the transcript a statement of the court as to what transpired in court on June 19, 1933. (Trans. 16.) This statement is dated September 25, 1933, three months after she had been committed to jail. This statement evidently was gotten up by counsel for plaintiff in an attempt to supply the place of a record of a hearing had on June 19, 1933. However, said statement does recite:

> "No further evidence of any character being offered by the defendant, nor heard by the court in behalf of either party." (Trans. 18.)

This statement has no place in the record. It is not a record required to be made by law.

The praecipe (Trans. 28) did not specify that this statement of the court be incorporated in the record and it cannot be considered for any purpose as it has no place in the record. It is not an opinion of the trial court nor an amendment to any order or judgment in the case.

> "Where the proposed addition is mere afterthought, and forms no part of the judgment as originally intended and pronounced, it can not be brought in by way of amendment."
>
> *Seaman v. Bonslett,* 118 Cal. 93.

From the record, to our minds, it is clear that no hearing was had, and that plaintiff offered no evidence to overcome the defendant's answer made under oath. (Trans. 3.) This answer was ignored and the court summarily committed the defendant to the County Jail where she remained until June 24, 1933, when she was released upon a bail bond of $2500.00. (Trans. 19.)

The minutes of the court, showing what transpired in court on June 19, 1933, are set out in the transcript from page 15 to the middle of page 16. These minutes show no hearing; on the contrary, they show that the court summarily found that defendant was guilty of contempt in failing to comply with the order of court dated May 22, 1933. (Trans. 15.)

The alleged report of the Special Master is referred to at pages 2, 7, 11, 12, 14 and 18 of the transcript, but it nowhere appears in any of the orders when this alleged report was made, nor is the same anywhere set out.

Therefore, there was no evidence offered showing that defendant had any of this alleged trust fund in her possession or under her control at any time, and the burden was upon plaintiff to prove by clear convincing evidence the guilt of defendant, as the alleged contempt was a constructive contempt if any contempt at all was committed.

In re Buckley, 69 Cal. 1.

A mere preponderance of the evidence is not enough.

Hotaling v. Superior Court, 191 Cal. 501.

In the order of May 22, 1933 (Trans. 1-2-3), it is recited that one W. E. Tucker, as Special Master, "to whom was referred, to take and state an account of certain trust passing into the hands of the defendant." Near the bottom of page 2 of the transcript the court finds this report to be true and correct, and the same is confirmed. Upon this alleged report of such Special Master, the court makes all the findings contained in the case, and without any other evidence being taken, the court finds the defendant guilty of contempt (Trans. 13) and summarily commits her to jail.

Before the alleged report of Tucker as Special Master could be made the basis for any finding, it must appear:

(a) That the reference was by the consent of the parties, or

(b) That the appointment of the Master was in an action pending on account of a dispute, it was a matter in which the court was empowered to make the appointment and refer the matter. Unless the

case is one in which a compulsory reference may be made, the consent of the parties must be shown.

Alexander Canal Co. v. Swan, 5 How. 83, 12 L. Ed. 60;

Philadelphia Cas. Co. v. Fechheimer, 220 Fed. 401.

A federal court has no authority to order a compulsory reference to hear and determine a common law action.

U. S. v. Wells, 203 Fed. 146;

Vermeula v. Reilly, 196 Fed. 226;

Swift v. Jones, 145 Fed. 489.

When we consider that the alleged report of the Special Master was the only evidence considered by the court, in order for that report to constitute sufficient evidence, all the jurisdictional features had to be recited and shown, otherwise it did not rise to the dignity of competent evidence.

This being a civil contempt, constructive in its nature, the burden was upon the plaintiff to establish by clear and satisfactory evidence that a contempt had been committed.

In re Buckley, supra.

Hotalling v. Superior Court, supra.

The record herein shows that this contempt proceeding was instituted by the plaintiff, as the affidavit of the attorney for the plaintiff shows. (Trans. 5.) The proceeding was wholly for the benefit of plaintiff to force the defendant to pay money to plaintiff.

Therefore, in order to warrant the court in finding the defendant guilty of contempt, the record must show that competent testimony was introduced to show that the alleged money was a trust fund and that the plaintiff was entitled to an order requiring the defendant to pay it to plaintiff.

On June 3, 1933, the defendant filed herein her answer to the order of May 22, 1933, to show cause, in which she specifically denies that she is possessed of any of the funds or that any part of it is under her control and also stating under oath that she is unable to comply with the order of May 22, 1933. (Trans. 3-4.)

In *Boyd v. Glucklich,* 116 Fed. at page 141 of the opinion, the 8th Circuit Court of Appeals, cited with approval the following:

> "If one is brought in, in contempt, deny all upon oath, he is of course discharged of the contempt, but if he has foresworn himself, he may be prosecuted for perjury."

Mr. Blackstone says:

> "If the party can clear himself upon oath, he is discharged but if perjured, he may be prosecuted for perjury."
>
> "The doctrine thus laid down is still the rule followed by courts of common law; thus courts uniformly holding, that if one accused of a constructive contempt answers all the charges under oath, he must be discharged; the answer must, for the purpose of the contempt proceedings, be taken as true, and extrinsic evidence can not be

received to impeach it. And this is the doctrine of the Federal Courts."

Judge Sanborn in his concurring opinion on page 142 in the same case does not agree that the answer is conclusive. However, on the same page, says:

"In all proceedings for contempt for the disobedience of orders in bankruptcy and in chancery, and in most of the states in all cases of proceedings for contempt for the disobedience of an order of court, the sworn answers of the party charged with contempt are evidence to perjure him thereof, but they are not conclusive evidence. They may be contradicted and supported by other testimony, and the question whether or not the party charged has purged himself of the contempt is always to be decided upon a careful consideration of all the evidence produced for and against him."

From the foregoing it is clear that defendant's answer, denying that she was in possession or control of the money, is *evidence.* As far as the record herein discloses and as a matter of fact, no consideration was given to her answer and she was summarily committed to jail.

"Inability to comply with the command of the court is always a complete defense to a charge of contempt. It can not be imputed to any one that he is guilty of a contempt of court for neglecting or refusing to do what is out of his power to do. An order of commitment in such a case is void."

Boyd v. Glucklich, supra, page 140;
In re Cowden, 139 Cal. 244.

Without considering the defendant's plea of inability to comply with the order, to commit her, is imprisonment for debt.

> "A court of bankruptcy can not sentence a bankrupt to imprisonment for debt any more than other courts of the United States can do that thing; and what it can not do directly, it can not do by induction under another name. It can not lawfully order the bankrupt to deliver to the trustee money or property he has not in his possession or under his control and imprison him if he does not comply with the order. Plainly, that would be imprisonment for debt, and the order is not relieved of that illegal and odious quality 'imprisonment for contempt'."
>
> *Boyd v. Glucklich,* 116 Fed. 136.

DEFENDANT'S ANSWER RAISED AN ISSUE.

Defendant filed her answer to the order of May 22, 1933 (Trans. 1), in which she denied having in her possession or under her control any of the alleged funds and also alleging under oath that she was unable to comply with the order of May 22, 1933. (Trans. 3.) This answer raised an issue that had to be tried and determined before defendant could be found guilty of any contempt.

> "In a prosecution for constructive contempt the affidavits on which the citation is issued constitute the complaint. (Hutton v. Superior Court, 147 Cal. 156 (81 Pac. 409); Frowley v. Superior Court, 158 Cal. 220 (110 Pac. 817); Selowsky v. Superior Court, supra.) The af-

fidavits of the defendant constitute the answer or plea (Mitchell v. Superior Court, supra), and the issues of fact are framed by the respective affidavits serving as pleadings. (In re Buckley, 69 Cal. 1 (10 Pac. 69); Mitchell v. Superior Court, supra.) A hearing must be had upon these issues (McClatchy v. Superior Court, supra; In re Buckley, supra; Code Civ. Proc., sec. 1217), at which competent evidence must be produced. (In re Buckley, supra; Goodall v. Superior Court, 37 Cal. App. 723 (174 Pac. 924); Code Civ. Proc., secs. 1218, 1220.) The proceeding is of such a distinctly criminal nature that a mere preponderance of evidence is insufficient. (In re Buckley, supra.)"

Hotaling v. Superior Court, 191 Cal. 505.

THE AFFIDAVIT OF MARTIN J. DINKELSPIEL IS WHOLLY INSUFFICIENT TO SUPPORT AN ORDER FOR A CONTEMPT.

Martin J. Dinkelspiel, one of the attorneys for plaintiff, filed an affidavit as the basis for the contempt charged against the appellant (Trans. 5), to this affidavit there annexed an interlocutory order. (Trans. 7.) The charging part of this affidavit is on information and belief, not a single fact is upon the knowledge of affiant. Besides, said affidavit does not in any way show that appellant was able to comply with the order; nor do any of the orders recite or show such ability. True, the order of commitment (Trans. 10), recites that the report of the Special Master was returned and filed April 21, 1933 (Trans. 11), but appellant was committed June 19,

1933 (Trans. 14-15), being sixty days after the Special Master's report was filed, while the record is silent when this finding was actually and in fact made.

The whole record shows that it was a proceeding to pay money. An essential fact, in such cases, to be established is the ability of the person charged to make payment.

> "The order of commitment should set forth that it is within the power of the party to comply."
>
> *Ex parte Cohen,* 6 Cal. 318.

> "Every court being, in contempt proceedings, a court of strictly limited jurisdiction, it is essential to the validity of a judgment directing the imprisonment of a person until he complies with an order of the court, that it should be *found* that he is able to comply."
>
> *Ex parte Silvia,* 123 Cal. 294.

> "And an order, adjudging one guilty of contempt for failure to perform an act directed by the court is void as a basis for the imposition of punishment, unless it appears therefrom that it is within the power of such person to perform the act (Bakeman v. Superior Court, 37 Cal. App. 785), and a mere recital in the order that obedience thereto is wilfully refused is not sufficient."
>
> *In re Cowden,* 139 Cal. 244;
>
> *Van Hoosier v. Railroad Commission,* 189 Cal. 233.

We ask that the order appealed from herein be reversed and that appellant be discharged from custody.

Dated, San Francisco,
February 23, 1934.

Respectfully submitted,
THOMAS F. MCCUE,
Attorney for Appellant.